

9. This conditional waiver for covered activities is in the interests of the San Diego Water Board and the public. It will result in increased protection of public health and the environment by expediting authorization for activities associated with cleanup and recovery following emergencies and will minimize the use of San Diego Water Board's resources, allowing it to focus on discharges that have a higher potential threat to water quality in the Region.⁴
10. Discharges subject to this conditional waiver will not pose a significant threat to water quality if dischargers comply with the waiver conditions. Therefore, monitoring requirements for discharges to non-federal waters of the State associated with repair and protection activities in emergency situations are not necessary.
11. Except as provided under Water Code section 13269, subdivision (d), and upon notification of the Regional Board, section 13269 subdivision (c) provides that neither submittal of a report of waste discharge, nor the adoption of waste discharge requirements is required for discharges that result from certain emergency activities. The emergency activities described in Water Code section 13269(c) are:
 - a. *Immediate emergency work necessary to protect life or property or immediate emergency repairs to public service facilities necessary to maintain service as a result of a disaster in a disaster-stricken area in which a state of emergency has been proclaimed by the Governor pursuant to Chapter 7 (commencing with Section 8550) of Division 1 of Title 2 of the Government Code; and*
 - b. *Emergency projects undertaken, carried out, or approved by a public agency to maintain, repair, or restore an existing highway, as defined in Section 360 of the Vehicle Code, except for a highway designated as an official state scenic highway pursuant to Section 262 of the Streets and Highways Code, within the existing right-of-way of the highway, damaged as a result of fire, flood, storm, earthquake, land subsidence, gradual earth movement, or landslide within one year of the damage. This paragraph does not exempt from this section any project undertaken, carried out, or approved by a public agency to expand or widen a highway damaged by fire, flood, storm, earthquake, land subsidence, gradual earth movement, or landslide. [Water Code section 13269(c)(1) and (2).]*

⁴ This conditional waiver is consistent with the purposes of the Governor's Executive Order, S-13-07, issued October 26, 2007, which encourages accelerated cleanup and recovery necessary as a result of the recent wildfires in San Diego and other Counties together with protection of public health and the environment. (See Executive Order S-13-07, Ordering Paragraph 13.)

12. Pursuant to Water Code section 13269(d), the San Diego Water Board has the authority to establish and require compliance with conditions of a waiver of requirements for discharges resulting from activities otherwise addressed by Water Code Section 13269(c). In these cases, dischargers must comply with an applicable conditional waiver issued by the San Diego Water Board.
13. California has largely relied upon its authority under section 401 of the federal Clean Water Act (CWA) (33 U.S.C. § 1341) to regulate discharges of dredged or fill material to California waters. Discharges to federal waters associated with emergency recovery actions can be addressed through the U.S. Army Corps of Engineers Regional General Permit (RGP) No. 63, which has been certified, pursuant to CWA section 401, by the State Water Resources Control Board (State Water Board) and are subject to waste discharge requirements issued by the State Water Board in *Water Quality Order No. 2003-0017-DWQ, Statewide General Waste Discharge Requirements for Dredged or Fill Discharges That Have Received State Water Quality Certification*. Therefore, this conditional waiver does not apply to discharges to federal waters that are subject to sections 401 and 404 of the CWA. This conditional waiver likewise does not apply to discharges regulated under a CWA section 402 storm water permit.
14. Eligible discharges to non-federal waters of the State, associated with emergency repair and protection activities, could be subject to *Water Quality Order No. 2004-0004-DWQ, Statewide General Waste Discharge Requirements for Dredged or Fill Discharges To Waters Deemed by The U.S. Army Corps of Engineers To Be Outside of Federal Jurisdiction*.⁵ This emergency conditional waiver can expedite projects that do not qualify for coverage by Order 2004-0004-DWQ but are conducted in response to emergency situations.
15. A conditional waiver may be terminated at any time by the State Water Board or the San Diego Water Board. Even if a discharger complies with all the conditions of a conditional waiver, the San Diego Water Board may choose to regulate any specific discharge with waste discharge requirements.
16. According to Water Code Section 13350(a), any person who discharges waste in violation of any waiver condition shall be liable civilly, and liability may be imposed, in accordance with Water Code Section 13350(d) or (e).

⁵ For instance, the General WDRs in Water Quality Order No. 2004-0004-DWQ are restricted to dredged or fill discharges of not more than two-tenths (0.2) of an acre and 400 linear feet for fill and excavation discharges, and of not more than 50 cubic yards for dredging discharges. Projects that may be covered include land development, detention basins, disposal of dredged material, bank stabilization, revetment, channelization, and other similar projects.

17. Pursuant to Title 14, California Code of Regulations, Section 15269, waiver of the requirements to submit reports of waste discharge and to obtain waste discharge requirements is statutorily exempt from the requirements of the CEQA because the waiver would apply only to emergency projects.
18. Any person aggrieved by this action of the San Diego Water Board may file a petition for review with the State Water Board. Petitions for review must be received by the State Water Board's Office of Chief Counsel within 30 days of the San Diego Water Board action. Laws and regulations pertaining to petitions are available on the State Water Board web site or will be provided by the San Diego Water Board upon request.

IT IS HEREBY ORDERED THAT, pursuant to California Water Code section 13269, the San Diego Water Board may waive the requirements to submit a report of waste discharge (Water Code sections 13269(a) and (b) and 13264(a)) and establish waste discharge requirements (Water Code section 13263(a)) for discharges to non-federal waters of the State associated with repair and protection activities in emergency situations in the San Diego Region, provided that the following conditions are met.

I. GENERAL, MONITORING, AND NOTIFICATION CONDITIONS

A. General Conditions

1. Discharge activities must not create or contribute to a condition of pollution or nuisance, as defined by Water Code section 13050.
2. Discharge activities must not create or contribute to conditions which violate the discharge prohibitions of the Water Quality Control Plan (Basin Plan) for the San Diego Region.
3. Discharges must not consist of unsuitable material (e.g., asphalt, hazardous wastes,⁶ nonhazardous wastes,⁷ designated wastes⁸ etc.) and material discharged must be free from toxic pollutants in toxic amounts.

⁶ Wastes that are required to be managed as hazardous wastes pursuant to California Code of Regulations, Title 22, Division 4.5

⁷ Nonhazardous wastes are defined in California Code of Regulations, Title 27, section 20220.

⁸ Designated wastes are defined in California Water Code section 13173.

4. Discharge activities must not result in the taking of any State endangered species, threatened species, or candidate species, or the habitat of such a species, unless the activity is authorized by the Department of Fish and Game pursuant to a permit, memorandum of understanding, or other document or program in accordance with Fish and Game Code sections 2081, 2081.1, or 2086.
5. This waiver is limited to emergency actions that meet the California Environmental Quality Act (CEQA) definition of "emergency" (California Public Resources Code section 21060.3)
6. Emergency projects exempt from the requirements of CEQA are defined by State of California Administrative Code (CEQA Guidelines), Title 14, California Code of Regulations, section 15269 as:
 - a. *Projects to maintain, repair, restore, demolish, or replace property or facilities damaged or destroyed as a result of a disaster in a disaster stricken area in which a state of emergency has been proclaimed by the Governor pursuant to the California Emergency Services Act, commencing with Section 8550 of the Government Code. This includes projects that will remove, destroy, or significantly alter an historical resource when that resource represents an imminent threat to the public of bodily harm or of damage to adjacent property or when the project has received a determination by the State Office of Historic Preservation pursuant to Section 5028(b) of Public Resources Code.*
 - b. *Emergency repairs to publicly or privately owned service facilities necessary to maintain service essential to the public health, safety or welfare.*
 - c. *Specific actions necessary to prevent or mitigate an emergency. This does not include long-term projects undertaken for the purpose of preventing or mitigating a situation that has a low probability of occurrence in the short-term.*
 - d. *Projects undertaken, carried out, or approved by a public agency to maintain, repair, or restore an existing highway damaged by fire, flood, storm, earthquake, land subsidence, gradual earth movement, or landslide, provided that the project is within the existing right of way of that highway and is initiated within one year of the damage occurring. This exemption does not apply to highways designated as official state scenic highways, nor any project undertaken, carried out, or approved by a public agency to expand or widen a highway damaged by fire, flood, storm, earthquake, land subsidence, gradual earth movement, or landslide.*

- e. *Seismic work on highways and bridges pursuant to Section 180.2 of the Streets and Highways Code, Section 180 et seq.*
- 7. Discharge activities must be the minimum necessary to alleviate the immediate emergency, unless complete reconstruction does not result in significantly increased impacts to aquatic resources, and logistical concerns indicate such reconstruction is as expedient considering the condition of the project site and is limited to in-kind replacement or refurbishment. Moderate upgrading would be considered if the applicant wishes to use bioremediation or other environmentally sensitive solutions.⁹ The waiver may NOT be used to upgrade an existing structure to current standards when that activity would result in additional adverse effects on aquatic resources. Such upgrade projects are considered separate activities for which a report of waste discharge will be required.
- 8. To ensure the project is being or has been accomplished in compliance with the terms and conditions of this waiver, representatives from the San Diego Water Board, or authorized representatives, must be allowed at all times, upon presentation of credentials:¹⁰
 - a. Entry onto project premises, including all areas on which fill or compensatory mitigation is located or in which records are kept;
 - b. Access to copy any records required to be kept under the terms and conditions of this certification;
 - c. Inspection of any treatment equipment, monitoring equipment, or monitoring method required by this certification; and
 - d. Sampling of any discharge or surface water covered by this Order
- 9. Work with heavy equipment must be avoided whenever feasible. If necessary, projects requiring heavy equipment to work in wetlands must implement effective measures to minimize soil disturbance. Such measures may include, but are not limited to, the use of wide-treaded equipment, mats, or flotation devices.
- 10. No activity may substantially disrupt the movement of those species of aquatic life indigenous to the water body, including those species that normally migrate through the area. Culverts placed in streams must be installed to maintain low flow conditions.
- 11. Discharges in spawning areas during spawning seasons must be avoided to the maximum extent practicable.

⁹ For example, it may be determined that reconstruction of a bridge crossing or a roadway damaged by flood flows is a more appropriate course of action than temporarily shoring up the facility to allow an immediate return of its use. When continued public safety is an issue, such reconstruction will remain a viable option for consideration under this waiver.

¹⁰ Pursuant to statutory authority granted under Water Code section 13267.

12. Discharges into breeding areas for migratory waterfowl must be avoided to the maximum extent practicable.
13. To the maximum extent practicable, discharges must not permanently restrict or impede the passage of normal or expected high flows or cause the relocation of the water except within the existing river plain (unless the primary purpose of the activity is to impound waters).
14. If the discharge creates an impoundment of water, adverse effects on the aquatic system caused by the accelerated passage of water and/or the restriction of its flow must be minimized to the maximum extent practicable.
15. Any structure or fill subject to the waiver must be maintained; including maintenance to ensure public safety, unless it is later determined that the structure is further contributing to other adverse conditions to private or public property. In such situations, corrective measures must be taken to rectify these adverse conditions, including removal and/or redesign of the original emergency corrective action, or appropriate mitigation as determined through coordination among the discharger and appropriate resource agencies. Temporary levees constructed to control flows shall not be maintained beyond the current storm season (i.e., maintenance of temporary levees is not authorized after the storm season in which the need arose).

B. Mitigation Conditions

1. Every effort must be made to ensure any material dredged or excavated from non-federal waters of the State is not likely to be washed back into any water of the State. When feasible, erosion and siltation controls designed to minimize turbidity in the watercourse above background levels existing at the time of construction, must be used and maintained in effective operating condition during construction unless conditions preclude their use, or if conditions are such that the proposed work would not increase turbidity levels above the background level existing at the time of work. All exposed soil and other fills, as well as any work below bankfull stage, or high tide line, must be stabilized at the earliest practicable date to preclude additional damage to the project area through erosion or siltation.

2. Temporary fills must be removed in their entirety and the affected areas returned to their pre-existing elevations and revegetated with appropriate native riparian or wetland vegetation common to the area. If an area impacted by such a temporary fill is considered likely to naturally re-establish native riparian or wetland vegetation to a level similar to pre-project or pre-event conditions within two years, then the requirement to re-vegetate may be eliminated by the San Diego Water Board.
3. Discharges of dredged or fill material into non-federal waters of the State must be avoided or minimized to the maximum extent practicable at the project site. Compensation for unavoidable discharge of fill materials may require appropriate mitigation measures. Factors that the San Diego Water Board will consider when determining the acceptability of appropriate and practicable mitigation will include, but are not limited to:
 - a. The approximate functions and values of the aquatic resource being affected, such as habitat value, aquifer recharge, sediment conveyance or retention, flood storage, etc.;
 - b. The permanence of the project's effects on the resource; and
 - c. The potential long-term effects of the action on remaining functions and values of the affected aquatic resource.

To be practicable, the mitigation must be available and capable of being done considering costs, existing technology, and logistics in light of the overall project. Examples of mitigation that may be appropriate and practicable include, but are not limited to: reducing the size of the project; establishing wetland or upland buffer zones to protect aquatic resource values; replacing the loss of aquatic resource values by creating, restoring, or enhancing similar functions and values; or using bioremediation techniques in conjunction with other methods to offset project impacts. To the extent appropriate, applicants may consider mitigation banking and other forms of mitigation, provide they contribute to the restoration, creation, replacement, enhancement, or preservation of aquatic resources.

C. Notification Conditions

1. Any person proposing discharges to non-federal waters of the State associated with repair and protection activities resulting from emergency situations in the San Diego Region must send the San Diego Water Board a signed, completed Notice of Intent (Attachment No. 1) as described below:
 - a. As early as practicable, but not later than 30 days following initiation of the discharge, in the following circumstances:

- i. A situation described in Finding No. 11 (Water Code section 13269(c)(1) and (2). This includes immediate work in response to a disaster when a state of emergency has been proclaimed by the Governor;
 - ii. A clear and imminent threat demanding immediate action exists in response to an emergency as described in Finding No. 4 (CEQA-defined emergencies), where prior notification to the San Diego Water Board is impractical. This can include emergencies that do not result in a state of emergency being declared by the Governor; or
 - iii. A repair and protection activity in response to an emergency as described in Finding No. 4 (CEQA-defined emergencies) would result in an insignificant or temporary (less than 120 days) discharge of inert material (e.g., sand bags or other erosion control material).
 - b. As early as possible, but not later than two days prior to the initial discharge activity in all other situations.
2. If part or all of a discharge activity that is enrolled in RGP No. 63 is determined to occur in non-federal waters of the State prior to the completion of the activity (i.e. submittal of RGP No. 63 completion report), the discharger shall submit a Notice of Intent to the San Diego Water Board within 30 days of notification of jurisdictional changes by the USACE. The project applicant may request that the San Diego Water Board consider actions taken to satisfy the requirements of RGP No. 63 as sufficient to fulfill the conditions set forth in this waiver.
 3. The discharger must send the San Diego Water Board a signed, completed Notice of Termination (Attachment No. 2) within 45 working days of completing the discharge activities and restoration activities.

II. NOTIFICATIONS

- A. This conditional waiver of statutory requirements in Water Code sections 13260(a) and (b), 13263(a), and 13264(a) shall remain in effect until **November 14, 2012**, unless the San Diego Water Board takes action to extend, revise, or rescind these requirements.
- B. The San Diego Water Board may issue specific waste discharge requirements for discharges of waste derived from disaster stricken areas creating emergency conditions located within the San Diego Region.